https://doi.org/10.69974/glslawjournal.v3i2.47

# Challenges in Enforcing Awards in Investor State Disputes

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## Abstract

*For many centuries, the pursuit of justice has been a universal human aspiration. Aspirations such as justice-social, economic, and political may be found in the Constitution's preamble. According to the Constitution, Article 39-A ensures that everyone has equal access to the court system. Adversarial litigation isn't the only way to settle conflicts, as the world has seen. Overcrowding in courtrooms, a scarcity of personnel, and other issues including delay, expense, and formality all point to the need for more innovative solutions. If you want to use an ADR mechanism, all you have to do is click on it. The Indian court infrastructure as it is right now is insufficient to deal with the increasing volume of litigation in a fair amount of time. Despite their best efforts, the average person may get mired in litigation for the rest of their lives, and it can even extend to the next generation in certain cases. In addition to being harassed, he risks depleting his resources in the process. All those involved in the administration of justice have a long-term interest in expediting cases and delivering high-quality justice, as has been correctly stated. The existing infrastructure of courts must be supplemented with ADR procedures as soon as possible in this context. ADR systems are being made available throughout the globe for settling ongoing disputes and at the pre-litigation stage, in addition to improving the efficiency of the judiciary's work. The sad reality is that we may be on our way to a society invaded by hordes of attorneys, ravenous as locusts, and bridges of Judges in numbers never before imagined, said former American Supreme Court Chief Justice Warren Burger. No, it's not true that the average person wants a courtroom with black robed judges, well-dressed attorneys, and ornate paneling to settle their conflicts in. People who have legal issues, like those who are in pain, want relief, and they want it as soon and cheaply as possible.*

*In all, ADR arbitration has risen to prominence as the preeminent ADR form. As a result, its usefulness has grown. Aside from court adjudication, it's very popular since it's the only option. Each country has had a distinct legal, social, and cultural evolution throughout its history. When*

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*foreign parties are involved in commercial discussions, they may come into differences. Even if the parties can come to terms, litigation may be necessary to assist them settle their differences. Litigation may be a barrier for parties because of the various laws and processes that apply in different countries. To resolve this issue, litigation may not be the best option. The private and impartial character of arbitration makes it an ideal dispute settlement technique.*

*In light of this, it's critical to assess if Indian arbitration law, as it now exists, is effective after being shaped by numerous conventions, treaties, laws, rules, and Acts, among other things. Accordingly, we're looking at legislative provisions as well as judicial approaches in the current study.*

## Introduction

There has never been a time in history when international trade has grown to such an enormous scale and magnitude that it can truly be considered the backbone of our commercial world. Those involved in international trade are doing so in order to make the most money possible by selling their products on the global market. People have been forced to leave their home countries for a variety of reasons, including the availability of specialized markets, a broad range of resources, and improved communication technologies. Multinational companies, industrialization, contemporary transportation systems, and outsourcing are just a few of the many variables that have had a profound impact. 1 As a result of the growth in global commerce, the globe has become a small town. In today's world, globalization is the phenomena that can no longer be stopped. As a result, countries from diverse cultural, social, and economic backgrounds are working together to improve the world by exchanging ideas, sharing resources, and providing guidance and learning from one another's experiences. The ultimate goal is to help people around the world live better lives by raising the standard of living for everyone. A positive procedure, it's essential for the country's future economic growth.

Participation in international commerce is important for nations since a country's citizens need the finest and most necessary goods. As a consequence of international commerce, cultures and ideologies from different countries have mixed together, leading to misunderstandings, disputes, and even wars. Interaction has led to a rise in conflicts, which is unavoidable in today's global business transactions. Genuine differences involve the meaning of the contract terms, the legal consequences for a contract, and the specific rights and duties of the parties themselves. Human errors, whether as a result of poor management or simple blunders, have also played a role in the failure to meet contractual obligations. "Contractual failures are the most common cause of disagreements between the parties." This may be due to the party's inability or unwillingness to pay. Consequently, rapid and efficient conflict resolution methods are required in the 21st century's fast-paced and technologically-driven cross-border environment. A disagreement is a necessary component of every human relationship. Most countries'

constitutions and national governments have created judiciary and comparable judicial tribunals known as body tribunals with the goal of resolving conflicts in an acceptable way. Public institutions for conflict resolution include courts and administrative tribunals.

Before and even after the creation of courts and administrative tribunals, society has tried to resolve conflicts via alternative private tribunals. As an alternative dispute resolution method, they are known as alternative dispute resolution (ADR).

In ADR, all kinds of conflict resolution procedures such as arbitration, conciliation, mediation and negotiation are collectively referred to as ADR. Instead of going to court, parties may use a variety of ADR techniques to work out their differences outside of it.

Arbitration as a method of resolving disagreements has a number of advantages.

Parties have complete control over the process thanks to their unrestrained free will. They have a say in who sits on the arbitration panels. Furthermore, they will choose a neutral nation as the site of arbitration, one that has no connection to either party to the dispute. As the rules and process may be tailored to the parties' preferences, arbitration offers the greatest degree of flexibility. Different issues need various considerations and regulations that will be put into action.

This is due to the fact that arbitration, in contrast to court procedures, is very secret and private. An arbitral institution is selected by both parties or the arbitration will be unanticipated, in which case there is no institution to worry about.

An 'Arbitral Award' is the name given to the judgment of the Arbitral Tribunal. However, there is no agreed-upon definition of what constitutes an award. To put it another way, it's the ultimate decision of the parties' rights and responsibilities. As soon as the prize is announced, there will be ramifications. Once the award is rendered, the Tribunal's power expires and it serves as final adjudication between the parties on the same claim.

Foreign court judgements and arbitral panel verdicts are not usually enforced by Indian courts. A party that wins a lawsuit in an overseas court may still be required to fight the case in an Indian court in order to ultimately receive relief from the judgment.

## Arbitration: Conceptual Dimension

Human conflicts and disagreements are unavoidable, according to conventional language. The idea of a human civilization free of conflict is absurd. Conflicts should be handled quickly and cheaply. In other words, more time and resources may be dedicated to more worthwhile endeavors.

Arbitration has been used throughout the globe as a conflict resolution alternative for millennia. Originally, it was conceived as a method for resolving business conflicts amicably among parties with differing interests. Agreements between the parties may make things simpler. You don't always have to select arbitrators who are judges. An arbitrator may be someone with specialized expertise in one or more technical areas.

If you're unfamiliar with the word, arbitration, you may learn more about what it means by looking up the definition on Wikipedia. It's been called a established, practical, and

well-understood technique for settling conflicts because of its clear societal and economic value.

Arbitration has been around since the dawn of civilization. In both the most basic and contemporary cultures, it may be found.

The settlement of a dispute by a third party to whom the parties have agreed to submit their claims in order to achieve an equitable judgment, as defined by the shorter Oxford English Dictionary definition.[2]

Halsbury[3] says: After hearing both sides in court, someone or some people other than a judge of competent authority refers the disagreement or difference between at least two parties for arbitration.

Black Law Dictionary: — An arbitrator is a neutral third person who makes a judgment after a hearing in which all parties have the chance to be heard. Arbitration is the process of resolving a disagreement.[4]

As per judgment in Collins v. Collins.[5]Arbitration is not exactly and precisely defined, but Article 2 (a) of the UNCITRAL Model law[6] on International commercial arbitration provides that for the purpose of this Law: — "arbitration‖ means any arbitration whether or not administered by a permanent arbitral institution. "

The English Arbitration Act of 1996 does not define arbitration. It simply starts with a description of the subject matter of arbitration and the underlying principles upon which the act is based. Section 1 of the report reads as follows:

1. To achieve a fair settlement of the issue by an unbiased tribunal without undue delay or cost is the purpose of the legislation.
2. The parties should be free to agree on how their conflicts will be handled, with the exception of protections required in the public interest, and court involvement should be limited.
3. Arbitration is defined as any arbitration, whether conducted by a permanent arbitral institution or not under Section 2 (1) (a) of the Arbitration and Conciliation Act of 1996.

An arbitration is international:

- The parties to an arbitration agreement have their places of business in separate States at the time of the agreement's conclusion.
- Somewhere that isn't in either party's home state:
- The arbitration will take place in the location specified in the arbitration agreement, if applicable.

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[2] Shorter oxford English dictionary: (3rd. edition – 1996).
[3] Halsbury's laws of England: (4th. edn. butterworths 1991) para 601, 332
[4] Black's Law Dictionary, 6th edn. (1990), West Publishing Co., p.105.
[5] Available at http://www.duhaime.0rg/LegalDictionary/A/Arbitration.aspx, (last accessed on April 17, 2016).
[6] Chanbasappa Hiremath AIR 1927 Bom 565-568-69(F.B)

- This may be any location where a significant portion of the business relationship's duties are to be fulfilled, or any location that is inextricably linked to the dispute;
- Specifically, the parties have agreed that the arbitration agreement's subject matter encompasses several countries.

New York Convention[7] The Convention on the Recognition and Enforcement of Arbitral Judgments, which deals with the recognition and enforcement of arbitral awards, does not expressly distinguish between domestic and international arbitration in plain language. There is a definition in the statute which states: "Foreign awards are those awards made in the territory of a state other than the state in which recognition and enforcement is sought, but it also includes awards that are not deemed domestic awards by the state in which enforcement is sought." The last line of Article I (1) of the New York Convention has resulted in a problem in the sense that an award that one country considers to be domestic because it involves parties who are nationals of that country can be considered to be non-domestic by the enforcement state if it involves the interests of international trade or is performed outside of the country.

The involvement of domestic courts in international business arbitration, on the other hand, should be kept to a bare minimum. Countries such as Columbia, France, and Switzerland have established a distinct legislative framework to regulate domestic and international business arbitration, acknowledging and taking into account the fact that different factors may apply to domestic and international commercial arbitration.

<u>An arbitration is international:</u>

- A dispute involving an arbitration agreement occurs when the parties have their places of business in separate states at the time of the agreement's completion.
- One of the following locations is located outside of the state in which the parties' places of business are located.
- The location of the arbitration hearing, if it is specified in or according to the arbitration agreement.
- Any location where a significant portion of the duties of the business relationship are to be fulfilled, or any location with which the subject matter of the dispute is most closely associated; or any location where the subject matter of the dispute is to be resolved.
- The parties have explicitly agreed that the subject-matter of the arbitration agreement pertains to more than one nation, and this has been stated in the agreement. The model legislation has resulted in a system that is both flexible and effective for determining whether an arbitration is of an international nature. As established by the Model legislation, the term of international includes both the nationalities of the parties as well as the nature of the dispute. The first portion of

[7] United Nations Treaty Series Vol. 330 No. 4739, 38. It was adopted by the United Nations Economic and Social council on 10th June 1958 to bring about the uniformity in Recognition and enforcement of the arbitral awards. It consists of 16 articles and has been ratified by 146 countries as on September 2012.

the term is primarily concerned with the nationality of the parties, i.e., where they are based in the country.

Arbitral Process :

Arbitral process has several significant attributes which are briefly discussed as under:

1. Valid Agreement to arbitrate.

An arbitration agreement is a written contract in which two or more parties agree to settle a disagreement outside of the courtroom via arbitration. In most cases, the arbitration agreement is included inside a superior contract. The disagreement may include the execution of a specific contract, an allegation of unfair or unlawful treatment at work, a defective product, or a variety of other problems and concerns.

An arbitration agreement may be defined in a variety of ways, each with its own set of rules. A written agreement to arbitrate, according to Article II (1) of the New York Convention, includes any agreement in writing under which the parties undertake to submit to arbitration legal relationship, whether contractual or not.[8]

In a similar vein, the Inter-American Convention on the Settlement of Business Disputes refers to an agreement in which the parties agree to submit any disputes that may develop or have arisen between them with regard to a commercial transaction to arbitration.[9]

Even the European Convention provides that —an arbitration agreement 'shall mean either an arbitral clause in a contract or an arbitration agreement.[10]

2. Laws applicable to the Arbitration

Arbitral disputes are resolved by the parties to an international arbitration agreement, which specifies whose law will control the decision in the arbitration procedure. Article 33 of the 1967 UNCITRAL Arbitration Rules emphasizes that the tribunal shall use the rule chosen by the disputants as relevant to the substance of the dispute, according to the rules. The principles of international law or general principles of law, the national law of any state, or international conventions as well as treaties are examples of the types of evidence that the disputants may use.

In the context of international commercial arbitration, it has long been recognized that the arbitration provision in a contract is distinct from the underlying contract, and that the law applying to the underlying contract does not necessarily apply to the arbitration agreement. However, in reality, the vast majority of contemporary arbitration laws provides for the parties to select which law would govern the arbitration agreement.[11] The failure of an arbitral tribunal to adhere to the explicit

[8] New York Convention, Article II (1)
[9] Inter –American Convention, Article 1.
[10] European Convention, Article I(2)(a)
[11] See for example the English Arbitration Act, 1996, section 4 and the Rome Convention, article 1,3 and 7. Indian Arbitration Act however does not allow the parties to decide the procedural law governing the arbitration.

or tacit choice of procedural law made by the parties constitutes a grave irregularity in the conduct of the arbitration. This is in line with Article V(I) (d) of the New York Convention of 1958, which states that a court may refuse to enforce an award if the arbitral process was not conducted according to the parties' agreement.

According to the UNCITRAL Model Law, the relevant legislation will be decided by the law of the jurisdiction where the arbitration will take place (the arbitration seat).

Any government seeking to update its arbitration legislation should approve the United Nations Commission on International Trade Law Model Law.

If there is no explicit clause stating which law will apply to the arbitration agreement, the relevant law must be inferred from the language of the agreement. There are many ways by which the relevant procedural law may be determined if there is no explicit or implicit statement of the parties' decision as to which procedural law should be used in the case. According to the Model Law of the United Nations Commission on International Trade Law, It was determined that the arbitral panel had used the broad principles of international law rather than the law of the country where the arbitration was held in the case of Texaco Overseas Petroleum Co. v. California Asiatic Oil Co. v. Government of the Libyan Arab Republic. They may pick a specific national law, combine multiple arbitration rules and national laws, choose specific arbitration rules or a law of reference in order to decide on a procedural law to govern arbitration, or any combination of these options.

In the case of Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (India)[12], Arbitration agreements are governed by either domestic or international law. "An oil platform installation contract was at issue in this case." According to the contract, All questions, conflicts or disagreements occurring under, out of or in connection with this contract will be subject to the laws of India, according to clause 17.1. Clause 17.2 said that any dispute would be resolved via ICC arbitration in London, with two arbitrators and one umpire presiding. India's supreme court ruled that because arbitration agreements are a component of a contract's substance and clause 17.1's wording are explicit in that regard, they are subject to Indian law if the parties have made an express decision for Indian Law to be their contract's appropriate law.

3. Arbitral tribunal

Parties to a dispute create an arbitral tribunal by agreeing to arbitrate their differences. It is up to the disputants to grant it whatever authority and powers they see appropriate,

[12] (1998) 1 SCC 305: AIR 1998 SC 825: 1998 AIR SCW 556: 1998 (1) SCJ 233.

as long as they do not go against the letter of the law. Mandatory rule of law compliance is required for every arbitration agreement. According of the SC decision in Irrigation Deptt, Govt of Orissa v. G.C. Roy,[13] the arbitral tribunal must also act and make its award in accordance with the general law of the land and the agreement.

Article 10 of the Arbitration Act, 1996 states that the arbitration tribunal must be set up in accordance with the arbitration agreement's terms and conditions. Disputes may choose the number of arbiters, but if they don't, then there will be three. This follows Article 10 of the Model Law (1985). However, the legislation should have specified odd number instead of number three to address conflicts in case there are more than two parties disputing. There is no question that the number of arbiters is limitless, but the overall number should be odd and manageable in order to arrive at a feasible outcome. In certain cases though, such as the Contracts (Regulation) Act of 1952 which established by-laws of the East Indian Cotton Association for arbitral purposes, an even number of arbiters is allowed and this shall be lawful under Section 3 of Chapter II of the aforementioned Act, Subsection 2 of Section 3.[14] To put it another way, the legislation should have allowed the appointment of a tribunal with more than three members in multiple-party conflicts when the number of arbiters is not agreed upon. Arbitration in India goes beyond the Model Law in that it forbids an even number of arbitrators. The Arbitration Act of 1996 nullified an earlier Indian law provision (the Arbitration Act of 1940) requiring arbitrators to select an umpire. Arbitral procedures with an even number of arbitrators are time consuming and inefficient, as experience has shown..[15]

Once the decision to start arbitration has been taken, and the appropriate form of notice or request for arbitration has been delivered, an arbitral tribunal must be established

4. Award of the Arbitral tribunal

It is up to the parties in a cross-border arbitration to determine what law should apply to the arbitral decision. Article 33 of the 1967 UNCITRAL Arbitration Rules states that The tribunal shall apply the rule selected by the disputants as relevant to the substance of the dispute. In a dispute, the disputants may choose from a variety of options, such as international treaties and conventions, national laws, or basic principles of law.

5. Recognition and the enforcement of the Award.

The next stage for the winning party is to put the award into effect once it is made. In legal parlance, this is referred to as the enforcement. When one side wins, they'll look for the nation or countries where the other's assets are located. The award will be enforced by filing a lawsuit in the courts of those nations. Countries that have ratified the New York Convention are obligated to put an award into effect where it was made. Most

[13] AIR 1992 SC 732 .

[14] Sub-section 2 of Section 3 in Chapter II of the Arbitration Act, 1996 reads as: ―The Commission shall consist of not less than two, [but not exceeding four] members appointed by the Central Government ...‖

[15] S.C.Tripathi. ―Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution, Sixth Ed. Allahabad: Central Law Publications, (2012), 117.

countries will enforce the award if it does not violate the convention's grounds for rejection or violate the country's public policy in some other way.

As a result of its long history, Arbitration has long been used to resolve conflicts between parties. Today, however, it is becoming more formalized while also becoming more specialized. With contracts worth hundreds of thousands of rupees being signed over the phone or through e-mail, it has shown to be a very efficient instrument for resolving disputes in our fast-paced environment. Rather of relying on the national court system, arbitration has developed into an effective and efficient instrument capable of delivering relief to the parties. National courts are overloaded. With the assumption that in the event of a disagreement, the issue would be handled promptly and equally for all parties, it has taken on a significant role and is a highly powerful weapon in the company worth millions.

## Case Studies: Legal Perspective on Enforcement of Foreign Arbitral Award in India

**Public Policy: An Open-Ended Standard**

It is the very ambiguous, subjectively susceptible nature of the phrase —public policy which empowered the courts to expand their reach into the contents of an arbitral award. Public Policy can never be sufficiently defined, and, as Burrough rightly remarked in the case Richardson v Mellish[16]: —It is never argued at all, but when other points fail‖.[17] The execution of the award would plainly harm the public good or, perhaps, enforcement would be completely objectionable to the ordinary reasonable and informed member of the public on whose behalf the powers of the state are used in order to take a defence of the public policy.[18] For the most part everyone agrees that public policy should be interpreted broadly except for foreign arbitral judgments, and that enforcement of foreign arbitral awards may only be withheld if doing so would contravene the forum state's most fundamental conceptions of morality and justice.[19] Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of Article V of the New York Convention.[20] The interpretation of public policy has not been a stroll in the park, since many courts in different countries have applied the ground and reviewed the decision on merits. This defeats the purpose of arbitration altogether.

[16] (1824) 2 Bing 229.
[17] Ibid.

[18] Andrew Tweeddale and Keren Tweeddale, Arbitration of commercial dispute392 (OUP Oxford, 1stedn, 2005)
[19] Supra *Note 1*
[20] Gary Born, International Arbitration: Cases and Materials (Aspen Casebook Series) 1035 (Aspen Pub, 2010).

**Foreign Award and Public Policy**

Section 48 (2) of the Arbitration and Conciliation Act, 1996 states that enforcement of a foreign judgment would be against Public Policy if it violates the Foreign Exchange Regulation Act, 1973's provisions.

**Arbitration Law on Public Policy:**

It is against Indian public policy for an Arbitral Tribunal or a single Arbitrator to issue an award that goes against the Public Policy of the country, according to the Arbitration and Conciliation Act, 1996. Various sections of the 1996 Act are discussed in detail below. For example, the Act states that an arbitral judgment may be set aside if a court determines that the award is in contradiction with the Public Policy of India.[21]— For the avoidance of doubt, and without prejudice to the generality of subclause (ii), it is hereby declared that an award is in conflict with the Public Policy of India if it was induced or affected by fraud or corruption, or if it was made in violation of Section 75 or Section 81 of the 1996 Act, as applicable[22].

**International Law Governing Public Policy:**

i) Geneva Convention 1927

Under the Geneva Convention, 1927[23], in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clause (a) to (e) of Article 1 of the convention needs to be full filled and in Article 2, it was prescribed that even if the conditions laid down in that article were fulfilled recognition & enforcement of the award would be refused if the court was satisfied in respect of matters mentioned in clause (a), (b) and (c) as given hereunder:-

- o The award has been revoked in the country in which it was issued, according to the ruling.
- Due to the party's legal inability to represent himself, he was not adequately represented by counsel.
- o That the award includes judgments on issues that were not included in the original submission to arbitration[24].

The rules that apply to the acceptance and enforcement of foreign awards are, in essence, the same as those that were established by the English courts under the Common Law system of legal reasoning. It was later discovered, however, that the Geneva Convention had certain flaws that made it difficult to reach a quick resolution of conflicts via arbitration, as was the case with the Hague Convention.

A direct consequence of this was the establishment of the New York Convention. The New York Convention seeks to remedy the aforementioned shortcomings by offering a

[21] S. 34(2) (b) (ii), Arbitration and Conciliation Act, 1996
[22] Explanation to Section 34 of the Arbitration and Conciliation Act, 1996
[23] Geneva Convention on Execution Of Foreign Arbitral Award, 1927
[24] Art. 2, Geneva Convention, 1927.

more straightforward and efficient means of gaining recognition and execution of international arbitration judgments.

**ii) New York Convention, 1958**

In line with Article III of the Dynasty Convention (1958), every receiving State must recognize awards as binding and enforce them in accordance with the foundations and process of the area on which the award is based. So the procedural aspects of submitting a foreign award would be governed by the laws of the country where the award is to be relied upon.

In addition, Article V(2) of the New York Convention (1985) states that the enforcement of an arbitral judgment may be denied if the legislation of the country where the recognition and enforcement are sought determines that the award is invalid or unenforceable.

- When arbitration is not an option under the legislation of the nation in question, or
- when recognition and enforcement of the judgment would be contrary to the public policy of the country in question, arbitration is the only option available to resolve the dispute.

iii) UNCITRAL Model law

Article 36 (b) of the UNCITRAL model law states that a court may refuse to recognize or enforce an arbitral judgment if it determines that:-

1. (1) the subject matter of the dispute cannot be settled by arbitration under the legislation of this state, or
2. (2) acceptance or enforcement of the award would be against the public interest of this state.

Perusing the Geneva Convention, 1927, New York Convention, 1958, and UNCITRAL Model Law (1985) reveals that the Public Policy of any country has a significant impact on international/foreign awards, and thus it is the public Policy that holds a priority over foreign awards or conventions in this regard. The construction agency should be familiar with the country's Public Policy before doing construction work, and rewards should be given based on that knowledge.

It's hard to think about public policy without referring to the Indian Contract Act of 1872. Unless otherwise prohibited by law, an agreement's thought or object is permissible, unless it would defeat the purposes of any law or would be fraudulent; or it would cause or imply harm to another's person or property, if permitted; otherwise, the court would find it immoral or contrary to public policy. Every one of these agreements is presumptively illegal because of the idea or purpose at the heart of it[25]

Since the 1996 Act is a combination of the 1940 Act, the 1937 Arbitration (Protocol and Convention) Act and the 1961 Foreign Award Act, which regulated foreign arbitral

[25] Section. 27, the Indian Contract Act, 1872.

judgments, there is no longer any confusion or duplication as a result of the 1996 Act. "Public policy was not included in the Arbitration Act of 1940." The phrase public policy was included in the Foreign Award (Recognition and Enforcement) Act of 1961 (the 1961 Act), which was an Act to give effect to the New York conference. As stated in the 1961 Act, A foreign judgment may not be executed under this Act- (b) if the court dealing with the matter is persuaded that-(ii) execution of the award would be detrimental to public policy.

**Interpretations of The Public Policy Defence By Indian Courts**

The 1996 Act consists of 2 components, part I and part II.

As far as arbitrations are concerned, Part I of the Act covers any and all cases in which India serves as both the venue and the court of final appeal. When an award is made outside of India, it is subject to enforcement under Part II of the Act. When referring to the 1996 Act, the phrase public policy was used twice: There are exceptions to this rule under Section 34 of the 1996 Act (Part I), if the award is in contradiction with India's general national policy. When a judgment is in conflict with India's general public policy (as in Article 34 of the UNCITRAL Model Law), the following rules apply:

1. 1. The sole way to bring an arbitral award before a court is to file an application for setting aside the award in accordance with sub-section (2) and subsection (1) of the Arbitration Act (3).
2. 2. A court may set aside an arbitral award only if it determines that the following conditions have been met:

   (i) The subject-matter of the dispute is not amenable to arbitration under

   (ii) current law, or

   The arbitral award is in conflict with the public policy of India.

   Enforcement of an arbitral award may also be refused if the Court finds that-

   1. 1. The dispute's subject matter is not susceptible of resolution by arbitration under Indian law; or
   2. 2. The award's implementation would be detrimental to Indian public interest.

Renusagar Power Electric Co v. General Electric Co 1994 Supp (1) SCC 644 (Renusagar), which concerned execution of an ICC Decision, was the first occasion the issue of public policy was raised as an exemption for implementation of a foreign arbitral award. This case occurred before to the 1996 Act and was governed under the 1961 Act.

**Renusagar Case: Narrow Approach on Public Policy–**

In Renusagar Power Electric co v. General Electric Co (Renusagar)[26]- In terms of public policy, the Supreme Court took a relatively limited stance. It was enacted prior to the 1996 Arbitration and Conciliation Act, thus it was governed by the 1961 Act.

**Short Facts:**

[26] 1994 Supp (1) SCC 644

A business registered in the state of New York, Renusagar Power Plant Ltd. signed a deal with General Electric Co. It was required to provide equipment and power services in order to build up a thermal power plant under the terms of the contract. "The Indian government has given its approval to the aforementioned deal." The deal was for $13,195,000 in total.

Everything had to be supplied by fifteen months of the effective date, and the plant's completion was scheduled to take place every thirty months. As part of the contract, money was to be made in installments, and completing unconditional negotiable speech act notes for each of those installments was required. If there's a misunderstanding about the contract that can't be resolved via genuine discussion, the matter will be arbitrated in accordance with the rules of the International Chamber of Commerce, which also completed the need for arbitration.

*Case Proceedings:*

After approaching the government for permission, Renusagar was told to take the required steps to make the payment of previous instalments currently in accordance with the requirements, and Renusagar contacted the government of India for approval of the amended schedule.

There were legal cases filed in city and metropolitan High Courts by each of the perimeters at this point, with General Electric initiating arbitration procedures against Renusagar before ICC's Arbitration Court. General Electric was granted a gift in the arbitration procedures, and it was also awarded real damages, which were calculated using the usual prime rate to calculate a comparable amount.

The award was contested on a number of grounds, one of which being that it was in direct contravention of Indian public policy. The reasoning was that the sequence in which interest was to be paid would be in violation of the Foreign Exchange Regulation Act. Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 applied to this case. Supreme Court justices were forced to decide on the spot whether to give the term public policy a narrow or wide meaning.

*Final Judgment*

Using classic textbooks on international business arbitration and citing English and Yankee courts, the Supreme Court provided an incredibly competent interpretation of the terms public policy and command while discussing the diverse choices of English and Yankee courts.

1. The payment of interest on interest (compound interest),
2. Possibility of violation of FERA,
3. Payment of damages,
4. Possibility of unjust enrichment by General Electric did not amount to or was not contrary to the public policy of India‖.

After reaching this conclusion, the Supreme Court stated, It is obvious that, given the Act's calculated and designed purpose of facilitating international trade and promotion

thereof by providing for the prompt settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting of its literal and grammatical sense, a liberal construction.

Renusagar was therefore a very right decision in that it adopted a limited interpretation of the phrase public policy and allowed very little room for judicial intervention in arbitration procedures and the ultimate determination of awards.

The defense of public policy to set aside an award under Section 34 (Part I) of the 1996 Act then arose in the case of Oil and Natural Gas Corporation v. Saw Pipes Ltd[27] case (Saw Pipes case). The issue was whether an award delivered in India could be set aside on the ground of public policy where the arbitral tribunal had inappropriately applied the law of liquidated damages.

**ONGC V. SAW Pipes Ltd[28]–**

Short Facts: When ONGC ordered pipes from SAW Pipes Ltd., it included a provision that stipulated arbitration as a means of resolving any disputes that may have arose. There were disagreements when SAW Pipes could not meet the delivery deadlines because of a nearly two-month-long European employees' strike. SAW Pipes notified ONGC of the situation, and ONGC responded by stating that the specified damages must be paid in accordance with the contract. After that, SAW Pipes delivered the pipes, and ONGC withheld a significant amount from the bill due to the delay, all on their own initiative and without any external adjudication or decision.

*Case Proceedings:* Respondents, i.e. SAW Pipes, prevailed in arbitration and received a favorable ruling thereupon. A single High Court Judge rejected the petition that was brought against it. A third challenge was rejected in front of a division bench as well. Two Supreme Court judges considered an appeal under Article 136 (Special Leave Petition) and overturned the award. It then examines the circumstances of the case and concludes that ONGC was right in deducting the money since the conditions of the contract were not met and the arbitrators were incorrect in awarding the amount with interest and therefore set aside the judgment. It is now.

The Court ruled that any arbitral decision that deviates from Indian law is patently unlawful and contrary to public welfare. By equating patent illegality with a error of law, the Court essentially opened the door for losing parties in the arbitral process to have their day in Indian courts on the basis of any claimed contraventions of Indian laws. Thus, the 1996 Act was rendered ineffective since it revived the possibility of an endless court review. "The judgment in the ONGC case drew harsh criticism from the international community." Even though the Supreme Court acknowledged that ONGC's lawsuit had drawn a lot of negative attention and was met with a lot of opposition, three years later, it still refused to refer the issue to a bigger Bench.

[27] (2003) 5 SCC 705
[28] *Ibid.*

However, although the Supreme Court in Renusagar ruled that the phrase public policy of India should be read narrowly, a Division Bench in the ONGC case ignored this precedent and broadened its reach to the point that arbitral judgments may now be reviewed on their merits, which was never the goal. For a time when every state is striving hard to be on pace with international conventions and norms, this is a significant step backward in laws pertaining to alternative dispute resolution (ADR).

In Saw Pipes, the Supreme Court cited the late senior advocate Nani Palkhiwala's opinion, which stated that As with other countries' statutes, India's new arbitration law is now on par with those in other countries. However, I wish Indian law included a provision like Section 68 of England's 1996 Arbitration Act, which gives a court the authority to correct errors of law contained within an award. It's a good point that courts of law may intervene if an arbitral judgment has been rendered unfairly because of an irregularity of some kind. There can be no true alternative dispute resolution system if the arbitral tribunal refuses to administer justice. The court would be fully within its rights to sustain the challenge to the award on the grounds that it conflicts with India's national policy if the award had led to injustice 's a good example of this. Adding patent illegality was allowed because the Indian arbitration act should include a provision comparable to the English Arbitration Act of 1996's error of law clause.[29]

The inclusion of the issue of patent illegality as a basis for rescinding an award broadened the scope of court involvement in the matter. Essentially, the Supreme Court opened the door for losing parties to file applications in Indian courts on the basis of any claimed contraventions of Indian law by equating patent illegality with a judicial mistake of law.[30]

**BALCO**

On 6 Sep 2012, the Indian Supreme Court delivered its much-awaited judgment in Bharat aluminium Co v. Kaiser aluminum Technical Services[31] (BALCO). "As part of its overall goal, BALCO urges Indian courts to become more arbitration-friendly, making them less vulnerable to intervening in the arbitrational process and decreasing judicial intervention." This is in line with the underlying philosophy and object of the ny Convention and UNCITRAL Model Law.

Due to the fact that the Indian Supreme Court was hearing a case requesting a reconsideration of its earlier decisions in Bhatia International v. Bulk Trading SA(Bhatie) and Venture International Engineering v. Satyam pc Services Ltd., BALCO actually lives up to the excitement and publicity generated within the international arbitration community once news broke earlier (Venture Global).

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[29] S. 68, English Arbitration Act allows challenges to an award due to serious irregularity and Section 69 allows an appeal to the court on a question of law.

[30] Aloke Ray and Dipen Sabharwal, ―What Next for Indian Arbitration?‖ The Economic Times, Aug. 29, 2006.

[31] **CIVIL APPEAL NO.7019 OF 2005.**

Overruling the Bhatia and Venture Global decisions

It was well known across the legal community that judgments like Bhatia and Venture Global, which were widely panned for expanding the scope of judicial involvement, had resulted in difficulties. In these decisions, the Indian Supreme Court assumed that, unless the parties expressly or impliedly agreed to the contrary through any arrangement, India's courts had jurisdiction with respect to foreign-seated arbitration similar to their curial jurisdiction with respect to arbitrations seated in India under Par. 1 of the 1996 Act, which is based on the UNCITRAL Model Law. For this incorrect interpretation, Indian courts claimed authority to provide interim remedies in support of foreign-seated arbitrations (Bhatia) and even to set aside judgments issued as a result of foreign-seated arbitrations (Vadivelu) (Venture Global).

According to the Indian Supreme Court in BALCO, Part I of the 1996 Act does not apply to foreign-seated arbitrations and solely pertains to domestic awards, which overturned Bhatia and Venture Global. As a result of two fundamental propositions that the court emphasized in its judgment, this conclusion was drawn: I UNCITRAL Model Law application was intended to be limited to the territorial jurisdiction of arbitration seat, i.e. territoriality principle; and (ii) arbitration seat is the centre of gravity for arbitration, and choosing a foreign-seated arbitration meant that the parties ordinarily also chose to arbitrate in the foreign country.

the 1996 Act should not have been given extraterritorial application since the Indian Parliament did not intend for it to do so when it passed the legislation, the court said in the Bhatia and Venture Global cases.

The legal consequences of overruling Bhatia and Venture Global

According to legal theory, the discrediting and overruling of the Bhatia and Venture Global judgments by the Indian Supreme Court in the BALCO case has a number of ramifications.

1. For starters, the grant of interim remedies in support of foreign-seated arbitrations purportedly according to Section 9 and Section 11 of the 1996 Act, and the making of default appointments of arbitrators in foreign-seated arbitrations purportedly pursuant to Section 34 of the 1
2. It will no longer be necessary for parties to expressly exclude the application of Part I of the 1996 Act, "which is now settled to apply only to domestic arbitration; in arbitration agreements that provide for foreign-seated arbitration on or after September 6, 2012, insofar as the Indian court's jurisdiction is considered it will no longer depend on its attempt to capture the express or implied intentions of the parties." A regular practice for parties who wanted Indian courts to interfere as little as possible with their contracts that involved at least one Indian party and contained a foreign-seated arbitration clause, which increased burdens in some way, was established after the Bhatia and Venture Global decisions.

3. It was also made plain in BALCO that Indian courts would not have jurisdiction to hear a civil action brought under the Code of Civil Procedure to seek interim relief in support of foreign-seated arbitrations. "The reason for this is because under Indian law, such interim remedy is not a sufficient cause of action to justify the initiation of a civil complaint." Before supervening legislation was established in those two nations to explicitly correct this issue, the situation under Indian law seems to be the same as under English law and Singapore law.

4. A last point to be made is that Part I of the 1996 Act will remain in effect for all arbitrations held in India, domestic or foreign, since Part I governs domestic awards. As supervisory courts at the arbitration's seat, the Indian courts will have extensive authority under Part I of the 1996 Act to monitor and assist the arbitral process in Indian-seated arbitrations. Including the authority to revoke a judgment entered as a result of an arbitration proceeding.

**Enforcement of Foreign Arbitral Awards in India**

Problems of executing Foreign Arbitral Awards in India

However, even if an international tribunal issues a favorable judgment in your favor, you will still need to pursue enforcement of that award in India. Almost often, parties agree to comply with arbitral decisions on their own will. There's an issue when someone contests an award and enforcement of it becomes necessary. Despite obtaining a favorable award, the party has been unable to have it enforced by a competent court in India in a number of instances. This is due to a variety of factors, including a party's decision to withdraw from arbitration or a party's appeal of the award due to costs imposed or the Arbitration Tribunal's jurisdiction. According to the Arbitration and Conciliation Act of 1996, an efficient way of resolving disputes was created for use both nationally and internationally. A foreign arbitral ruling is not automatically implemented in India, as previously mentioned. Enforcing a foreign arbitral judgment involves so much litigation that it virtually defeats the objective of facilitating quick resolution of disputes. Only a small number of the parties accept the Arbitrators' decision.

When awards are being executed and enforced, most people choose to contest them in Indian courts. Section 48 of the Act allows a party to contest a foreign arbitral award. For the first time, it specifies the grounds for appealing a foreign arbitral ruling. These are the explanations behind your choice:

- Either party is under some Incapacity

The award cannot be enforced if one or both of the parties engaged in the arbitration procedures were found to be legally incompetent under the relevant legislation at the time of the award. This inability may be caused by a variety of factors, including involuntary participation, fraud, coercion, undue influence, or deception.

The Supreme Court, in Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors,[32] observed that

> Fraud is defined as the deliberate attempt to mislead; The term fraud refers to two elements: deception and damage to the individual who has been misled. The Court went on to say that a fraudulent misrepresentation is referred to as deception, and it consists in deceiving a man into causing him harm by deliberately or carelessly leading him to believe and act on false information. If a person makes statements that he or she knows to be untrue and a harm results as a result of the representations, the party is guilty of fraud in law.

- Either party was not given Notice
  In the event that neither party has received a notification about the selection of the arbitrator nor the commencement of the arbitral proceedings, this would constitute a breach of the fundamental principles of natural justice. It is possible that such awards will be thrown out. However, if a party has freely chosen to withdraw from the arbitral proceedings, any awards made as a result of that decision will be enforced since the withdrawal was made of his own free will. If one of the party's members was left out for circumstances that were beyond its control, only those prizes may be called into question.
- The Arbitral Award is beyond the scope of Arbitration
  The jurisdiction of an Arbitration Tribunal is restricted by the terms of reference that it has been established by the parties. No tribunal should be allowed to disregard these restrictions. They are only meant to make decisions on the questions that have been presented, and they are not allowed to go any farther than that. In the event that an award is given that is outside of the scope of Arbitration, it may be set aside by the Courts.
  We should point out that if it is feasible to distinguish between awards made within the parameters of the arbitration agreement and awards made outside those parameters, the former may be enforced while the latter cannot be.
- Legality of the Composition or Procedure of the Arbitration Tribunal
  An award is liable to be quashed if:

1. 1. The composition of the tribunal does not match the agreement signed by the participants.
2. The arbitration process used did not follow the terms of the parties' agreement.
3. In cases where the arbitration's composition or process does not comply with the legislation of the nation where the arbitration was held,

- Award set aside before its enforcement
  It will not be possible to enforce an award in Indian courts if it is set aside or suspended by the authorities of the nation in whose jurisdiction it was given

[32] (2005) 7 SCC 605).

before it becomes binding on the parties. The Indian courts have no authority to set aside awards made by other countries.

- Dispute not capable of being resolved under Arbitration
  It will not be possible to enforce an award in Indian courts if it is set aside or suspended by the authorities of the nation in whose jurisdiction it was given before it becomes binding on the parties. The Indian courts have no authority to set aside awards made by other countries.
- Public Policy

An award that is made in contravention of the Public Policy of India would not be enforceable in the country of origin. An award made in violation of public policy may be used as a defense against the enforcement of such awards in court. The courts in India are required to reject the execution of an award if it is in violation of the country's general public policy.

Settling the dispute as to what will amount to the violation of Public Policy of India, the Supreme Court, in Renusagar Power Co. Ltd vs General Electric Co[33], held that the bar of public policy will be attracted only when there is a violation of something more than the Indian Laws. The enforcement would be refused if the award is contrary to the fundamental policy of Indian law or justice or public morality.

The Delhi High Court, in Daiichi Sankyo Company Limited vs. Malvinder Mohan Singh and Ors.[34], held that the defense of the ground of public policy can be taken only when the award is against the fundamental policy of India, the interest of India or justice/ morality. As a result of this decision, the Indian Courts will have a chance to review the award once again. This court also ruled that Indian courts have the authority to set aside claims prohibited by statutes of limitations, awards of consequential damages, and judgments made against minors.

## *Pressure by the Local Governments*

A local party to an Arbitration will be able to exert more political influence than a foreign party to the same arbitration. They will attempt to use this authority to have the award revoked or, at the very least, have the amount of the award reduced. This may result in the award made by an International Arbitration Seat being thrown out of court. Inadequate power to oversee the substantive and procedural examination of the execution of these awards has resulted as a result of a lack of legislative authority.

## *Inconsistent Application of Law*

A Foreign Arbitral Award may be executed in any country where the assets of the other party are located, including the jurisdiction where the award was made. Although it cannot be entirely out, the potential that various courts in different jurisdictions would

[33] 1994 Supp (1) SCC 644

[34] O.M.P.(EFA)(COMM.) No. 6 of 2016 .

interpret the same judgment differently cannot be ruled out. Even though an award made by an Arbitration sitting in India is enforceable in the Jurisdiction of another nation, it may not be enforceable in the Jurisdiction of India.

## Conclusions and Suggestions

It is governed by the Indian Arbitration and Conciliation Act, 1996, which regulates arbitration in India. The Arbitration Act of 1996 is based on the Model Law of the United Nations Commission on International Trade Law and is consistent with current international practice in international arbitration. However, in recent years, judgments handed down by the Supreme Court have resulted in erroneous interpretations of the provisions of the new Act. It is recommended that judges in the Indian Court should strictly adhere to the dividing line established by the Act, which distinguishes between domestic awards under Part I and foreign awards under Part II.[35]

Because India has chosen to make use of the reciprocity reservation provided by the New York Convention, awards made in countries other than India will only be enforced in those countries that have been notified in the official gazette of India as countries that have ratified the convention on a reciprocal basis. Some argue that this has limited the enforcement of awards because a number of countries have ratified the convention but have not been notified in the official gazette of India, as these countries are not obligated to accept the convention on a reciprocal basis, which means that awards issued in these countries will not be enforced in India. As a result, India should either eliminate the reciprocal restriction or inform the nations concerned in the official gazette in order to enhance enforcement.

It is further argued that the Supreme Court, in a number of judgments such as Bulk Trading, has made the incorrect conclusion that Part I of the Act applies to foreign awards, an approach that is inconsistent with the terms of the Act. In other words, it also implies that the foreign award may be contested under Section 34, which deals with contesting domestic awards in the first place. It was proposed that Indian courts should abandon their nationalistic perspective and begin to consider awards made in other countries as legitimate if they are founded on solid legal principles and taken into consideration all of the facts and circumstances surrounding the case. It is suggested that, because there is no provision in the current Act for the review of foreign awards, the judiciary should be cognizant of this fact and should respect the intent of the legislature in drawing a clear line between domestic awards that can be reviewed and international law for which there is no provision for such review.

[35] However, after following the wrong interpretation for a decade Supreme Court corrected its stance in Bharat Aluminum case in September 2012. This is welcome decision and has corrected the position in regard to the enforcement of the foreign awards in India.

While Indian law of arbitration recognizes the effect of multilateral conventions or bilateral treaties, if they are applicable to a foreign award, under the New York Convention (1958) or the Geneva Convention (1927), the most favorable law or conventions can be applied when enforcing a foreign award under Indian law of arbitration. The most favorable enforcement regime available within the Indian legal system and treaties that India has ratified is therefore the option to be pursued in the first instance. As a matter of fact, the present Indian legislation is more favorable to the enforcement of foreign and international awards than the New York Convention in many respects.

While the Indian legal system is generally consistent with the Convention and internationally recognized norms, it does fall short in certain areas. For example, although the reasons set out in Article V of the Convention may result in the non-enforcement of a judgment, Indian law requires a court to deny execution of a judgment if such grounds exist. Furthermore, the latter recognizes non-compliance with moral principles as a basis for refusing to enforce an award, while no such ground is recognized under the former.

Convention. A requirement of this kind may result in wide or competing interpretations, which may undermine the necessary uniformity.

Finality, It is an opportune moment to change the Indian arbitration law, as it is now. To address the severe lacunae and problems stated above, the Indian arbitration legislation should be modified to include internationally recognized procedures and standards. "This will help to enhance the country's arbitral landscape on both a local and international level." In order to achieve this, various arbitration-related legislation, including international arbitration, should be adopted, as well as the establishment of several arbitration-related bodies, whether domestic or international, as well as the accession to international and regional conventions and treaties. This should be done while making an effort to coordinate efforts between the various bodies.

The absence of such coordination results in confusion, which contradicts the entire reason for resorting to arbitration in the first place, which is to simplify the process and save time. It may be beneficial to conduct careful regional or international convergence and legal transplants in the field of International Commercial Arbitration, provided that they are consistent with the rest of India's legal system.